

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE:

B-222197

DATE:

June 19, 1986

MATTER OF:

E. C. Campbell, Inc.

## DIGEST:

1. Acceptance of a proposal which fails to conform with material solicitation requirements (concerning delivery and payment) without first amending RFP to provide offerors an opportunity to respond to changed requirements is improper.
2. Where agency accepted company's offer which contained payment and delivery terms contrary to those contained in the solicitation and which afforded the company an unfair competitive advantage over the protester, recovery of protester's proposal preparation costs is appropriate. Protester had a substantial chance of receiving the award and was unreasonably excluded from the procurement without being afforded an opportunity to propose on the basis of the contracting agency's actual needs, and other remedies are not appropriate.
3. Recovery of costs of filing and pursuing the protest may be allowed since the agency unreasonably excluded the protester from the procurement and GAO does not recommend that the protester be awarded the contract.

E. C. Campbell, Inc. (Campbell), protests the award of a contract to Raymond Corporation (Raymond) by the Naval Supply Center, Norfolk, Virginia, under request for proposals (RFP) No. N00189-85-R-0427 for a "Narrow Aisle System."

The RFP calls for a single complete and operable "Narrow Aisle System" (System) ready for use consisting of: five electric, narrow aisle, wire guided, turret type stacker trucks (trucks); pallet storage racks (racks); wire guidance systems; battery charging systems; and drawings/manuals. The equipment is to be installed, in two working warehouses, as seven operationally independent subsystems. Each subsystem corresponds to a section of one of the two warehouses. To facilitate rewarehousing, the equipment in each warehouse is to be installed one subsystem at a time. To this end, installation of battery charging stations and

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at least one truck is required prior to completion of the first subsystem in each warehouse. Upon completion of installation the entire system must pass a series of tests prior to final acceptance and payment.

Campbell contends that the award is improper because the Navy materially altered the ground rules of the competition for Raymond's benefit without advising other offerors. Specifically, the Navy acceded to a request for partial payments contained in Raymond's proposal by: (1) subdividing the single "Narrow Aisle System" line item into three separate lots as follows:

"Item 0001AA [Narrow Aisle System] shall consist of the following:

. . . Trucks	1 lot	\$265,141.45
Delivery	. . . (31 March 86)	
Racks	1 lot	\$356,047.09
Delivery	. . . (27 Feb. 86)	
Installation	. . . 1 lot	\$136,358.46"

and (2) modifying the contract thus awarded to authorize payment ". . . after delivery of each item in 0001AA in the amount as indicated after submission of proper invoicing." Campbell urges that this is tantamount to payment upon receipt and that any payment prior to acceptance of the entire system is in direct contravention of both the RFP which provided for payment only after acceptance of the system and Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.232-1 (1984).

We sustain the protest.

The Navy urges dismissal of Campbell's protest as untimely on the grounds that Campbell failed to diligently pursue the information forming the basis of its protest. After learning of the award to Raymond, Campbell promptly filed a Freedom of Information Act (FOIA) request dated October 2, 1985, seeking a copy of the winning proposal. The Navy admits both receiving and failing to respond to the request until Campbell filed a second FOIA request 3-1/2 months later. Campbell states that it received the requested information on February 19, 1986. Campbell filed its protest here on March 4, 1986, within 9 working days of its receipt of the information. Nevertheless, the Navy urges that Campbell's failure to follow up its first request

sooner than it did is a sufficient basis upon which to find that Campbell failed to diligently pursue its protest.

It is not clear to us why Campbell failed to follow up sooner its FOIA request. We have recognized that it is incumbent upon a potential protester to seek diligently whatever relevant information is needed to determine whether a basis for protest exists. Policy Research, Inc., B-200386, Mar. 5, 1981, 81-1 C.P.D. ¶ 173. Nonetheless, here, given that the Navy concedes it failed to respond promptly to Campbell's FOIA request, the serious nature of the allegation raised by the protest and the subsequent admission by the Navy discussed below that the award to Raymond was improper, we do not think the doubtful timeliness of Campbell's protest should preclude consideration of the protest. See Comdisco, Inc., 64 Comp. Gen. 11 (1984), 84-2 C.P.D. ¶ 416.

It is fundamental that an agency must treat offerors equally, and that they must be furnished with identical statements of the agency's requirements in order to provide a common basis for submission of proposals. Computek Inc., et al., 54 Comp. Gen. 1080 (1975), 75-1 C.P.D. ¶ 384. When an agency's needs change and create a material discrepancy between the RFP's statement of the requirement and/or ground rules under which the procurement will be conducted and the agency's actual needs, the RFP should be amended and all offerors within the competitive range afforded an opportunity to revise their proposals. Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 C.P.D. ¶ 134; CDI Corp., B-209723, May 10, 1983, 83-1 C.P.D. ¶ 496. It also is clear that an agency may not accept a proposal which fails to comply with a material requirement of the solicitation, notwithstanding the proposal's lower cost. 53 Comp. Gen. 382 (1973).

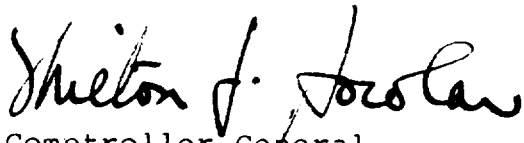
Here, the Navy admits that the award is flawed because either none of the offerors or all of the offerors should have been allowed to submit proposals on the basis of phased delivery and partial payments. Thus, depending on the Navy's actual minimum needs, the Navy either should have rejected Raymond's best and final offer because it took exception to material solicitation terms or the Navy should have amended the RFP to reflect the relaxed delivery and payment requirements and afforded all offerors an opportunity to submit proposals on the basis of the Navy's actual needs. Cf. Empire Moving and Storage Co., B-210139, May 20, 1983, 83-1 C.P.D. ¶ 543.

Although the contract was improperly awarded to Raymond, it is impracticable for our Office to recommend corrective action now that the equipment has been delivered and substantially installed. However, where a protester has been excluded unreasonably from a procurement and various remedies specified in our regulations are not appropriate, the recovery of proposal preparation costs is allowable. See 4 C.F.R. § 21.6(d), (e) (1985).

The record shows that Campbell's price, without the benefit of phased delivery and partial payments, is only \$2,961 greater than Raymond's price, a difference of less than half a percent. Campbell points out that, if it had the advantage of the same phased delivery and partial payment terms advanced to Raymond, it would have reduced its offer by as much as \$12,000 to \$15,000. While we cannot be certain how much Campbell would have reduced its offer, we think some reduction in price was likely and a reduction in excess of the \$3,000 difference between the proposals not unlikely. In this connection, we note that Campbell's proposal was apparently based on self-financing the project costs, at a 12-percent interest rate, for approximately 10 months until the Navy tested, accepted and paid for the entire System, while Raymond's proposal was founded on the knowledge that it could recoup 47 percent of the System price within 5 months of award, and 82 percent of the System price within 6 months of award. Thus, because of the agency's acceptance of Raymond's terms, Raymond obtained a competitive advantage over Campbell.

We therefore find that Campbell clearly had a substantial chance of receiving the award, and since no other corrective action is appropriate, Campbell may be allowed recovery of its proposal preparation costs. We further find that Campbell should be allowed recovery of its costs of filing and pursuing the protest, as, under the circumstances, we have been unable to recommend an award to Campbell. See E. H. Pechan & Assoc., Inc., B-221058, Mar. 20, 1986, 86-1 C.P.D. ¶ 278. Campbell should submit a detailed accounting of its costs to the Navy, and Campbell and the Navy should attempt to reach agreement on the amount of the costs. If they cannot reach agreement within a reasonable time, we will determine the amount. 4 C.F.R. § 21.6(f).

The protest is sustained; the protester is entitled to the costs of proposal preparation and of filing and pursuing the protest.

*for*   
Comptroller General  
of the United States